Steve Hollander d/b/a Hollander Electric *and* International Brotherhood of Electrical Workers. Case 4–CA–22060

July 13, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

The only issue presented to the Board in this case[1] is whether the judge erred by declining to recommend a backpay remedy for one of two discharged discriminatees. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Steve Hollander d/b/a Hollander Electric, Milltown, New Jersey, his heirs, devisees, personal representatives, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Make James R. Conroy and Robert L. Curran whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.''

2. Substitute the attached notice for that of the administrative law judge.

[1] On April 21, 1995, Administrative Law Judge George F. McInerny issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) and (3).

[3] As indicated, the judge declined to order backpay for discriminatee James R. Conroy. He reasoned that backpay would be a windfall in light of Conroy's failure to state at the hearing that he would resign his full-time union position to work for the Respondent. We find merit in the General Counsel's exception to the judge's finding. Backpay is an essential part of the Board's traditional remedy for a discriminatory discharge. Conroy's retention of employment with the Union after his undisputedly unlawful discharge by the Respondent has no relevance to his entitlement to this make-whole remedy. Accordingly, we shall modify relevant provisions in the Order and notice to provide for backpay to Conroy. We leave to the compliance stage of this proceeding the question whether Conroy's postdischarge earnings with the Union are to be considered interim earnings deductible from backpay.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT state that we will not hire union members as employees.

WE WILL NOT discharge or rescind the hire of employees because of their union membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer James R. Conroy and Robert L. Curran immediate reinstatement to the positions for which they were hired on September 1, 1993.

WE WILL make whole James R. Conroy and Robert L. Curran for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them.

STEVEN HOLLANDER D/B/A HOLLANDER ELECTRIC

Margarita Navarro-Rivera, Esq., for the General Counsel.
Steve L. Hollander, pro se, of Milville, New Jersey, for the Respondent.
Bernard M. Katz, Esq. (Meranze & Katz), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

GEORGE F. MCINERNY, Administrative Law Judge. Based on a charge filed on September 2, 1993,[1] by International Brotherhood of Electrical Workers (the Union), the Regional Director for Region 4 of the National Labor Relations Board issued a complaint on January 28, 1994, alleging that Steve Hollander d/b/a Hollander Electric (Hollander or Respondent) had violated Section 8(a)(1) and (3) of the National Labor Relations Act, by discharging James R. Conroy and Robert L Curran. The Respondent was represented by a lawyer at

[1] All dates herein are in 1993 unless otherwise specified.

that time. The lawyer filed an answer denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held before me in Philadelphia, Pennsylvania, on October 13, 1994,[2] at which all parties were present and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally.

Following the close of the hearing, the General Counsel filed a brief, and the Respondent filed a letter, both of which have been carefully considered.

On the entire record, including my observations of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent's lawyer, who did not appear at the hearing, admitted, in the answer, that Hollander is a sole proprietorship having his principal place of business in Milltown, New Jersey, and that he is engaged in business as an electrical contractor at various jobsites, including one at the Marple-Springfield shopping center in Delaware County, Pennsylvania (the shopping center).

The answer denied other allegations in the complaint relating to jurisdiction. The General Counsel had subpoenaed a number of documents from Hollander for the purposes of proving that he was in fact engaged in commerce. Hollander testified that he did not understand the subpoena, and that he though all he had to bring were two documents; one, his contract for work at the shopping center, and the other an employment application for Scott Edmonson, a person admitted here to be a supervisor. The General Counsel introduced the contract into evidence (G.C. Exh. 3). The document shows that on August 30, 1993, Hollander contracted with Gibbs Construction, Inc., of Garland, Texas, to do electrical work at the shopping center for the sum of $70,200. According to Hollander's testimony, his services were terminated by Gibbs before the job was finished, but he said he received at least $50,000 in payment from Gibbs. Because this work was performed for a contractor from Texas by a contractor from New Jersey, on a jobsite in Pennsylvania, and because the value of the contract was over $50,000, and in view of the diversity of citizenship between the parties, I find that Hollander is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Hollander's answer claims to have no knowledge of the complaint allegations that the Charging Party here is a labor organization. James R. Conroy, president for 9 years and organizer for 3 of those years of the Union, testified that the Union admits employers to membership and that it exists, at least in part, to negotiate with employers for the benefit of employee members. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[2] The General Counsel has filed a motion to amend the transcript of the hearing in a number of respects. There being no objection, and because the proposed amendments comport with my memory of the proceedings, the motion is allowed and the transcript is amended as recommended by the General Counsel.

III. THE ALLEGED UNFAIR LABOR PRACTICES

As noted in section I, above, Hollander obtained a contract to perform electrical work at a shopping center in Delaware County, Pennsylvania, on August 30, 1993. Before this, probably in anticipation of his needs on this job, he put an advertisement in the Sunday, August 29, Philadelphia Inquirer for an ''electrician/mechanic, lead person.''

This caught the attention of James Conroy and he called the New Jersey number given in the newspaper advertisement. When Holland answered, Conroy gave his name, but did not otherwise identify himself. He inquired about the job and Hollander referred him to Scott Edmonson, whom he identified as the foreman. Hollander said that Scott was doing the hiring and he would determine the rate of pay.

On the next morning, September 1, about 10 o'clock, Conroy and an out-of-work union member named Robert Curran went out to the jobsite.[3] Conroy noted that the site, which was intended for an Office Max store, was quite large, taking in about three ordinary sized stores. Scott Edmonson met them and he explained that the work was going to consist of air-handling equipment, systems, controls, fixtures, and power. He asked about their experience. He told them the rate would be $12 an hour, with no taxes deducted, and no fringe benefits. He then told Conroy he would start on September 13, and Curran 2 or 3 days later, when certain fixtures and equipment were delivered to the job. Conroy asked Scott if he could meet with the owner and Scott replied that Hollander would be on the job about 3 o'clock that afternoon. Conroy and Curran then left the job.

What happened then was not clear. Scott Edmonson did not testify here, so his version of any of the facts here presented is unknown, but apparently he sensed something about these two new employees.[4] In any event, when Conroy and Curran returned to the job that afternoon, shortly before 3 o'clock, they met Scott, who told them that he could not hire them because Steve Hollander had hired someone else. After some discussion they went outside the store.[5] Conroy then identified himself as a union representative and gave Scott his business card. Scott told him that he knew they were union people, and that he knew they were there to ''Salt me down,''[6] He then said he could not hire them because they were union members. He expressed fear for his own job if he did it, and said he had to make a living, and provide for his family. Conroy and Curran then left.

Hollander testified that Scott called him after the two union men had left, saying that there were union people there on the job who were out to cause trouble.

Later that day, or in the next day or so, Hollander called Conroy, having obtained his number from Scott. He told Conroy that it was Scott who made the decision not to hire them, and that he himself would not object to doing the job with union people, but it was a no-bid job. Gibbs set the

[3] Curran was a rank-and-file member who held no union office.

[4] I find that by his assignment of starting dates to Conroy and Curran, Scott in fact hired them. He was the Respondent's foreman on the job identified by Hollander as the person who would be hiring for the job. His actions were unequivocal and the testimony of Conroy and Curran was credible and undenied.

[5] Conroy said it was too noisy to talk inside.

[6] Meaning to infiltrate the job and organize for the Union or to sabotage the job.

price and Hollander had taken it, leaving no money in the contract to pay union rates. There was no further contact between the parties.

Both Curran and Conroy testified that they would have taken this job, despite having to work alongside nonunion employees, and that they both had worked in nonunion settings before.[7] Scott had told them that there was at least 3 months work at this and another job in Philadelphia.

Hollander testified that he had no animus toward unions; that he wished he could operate union, but in his present situation he just couldn't live if he had to pay union rates. He maintained that Scott was not told to keep union people off the job.

Greg Pantos, who described himself as the ''supervisor'' on the job, testified that he heard the conversation between Scott and the two union men. He stated that they were not dressed to go to work, that Scott told them that the job paid $8 an hour for a helper, and that they only needed a helper. Pantos said that Scott told him he didn't hire the two men because they did not look like they were prepared to go to work and that they were union people trying to start trouble.

Hollander's testimony did not reach the issue in this case, that is, whether Scott Edmonton hired Conroy and Curran, and then told them they were not hired. Pantos, as I noted his demeanor while he testified, was an unreliable and confused witness. He said he was beside Scott and the union people when they had their first conversation, then he said he was behind them. He talked about tests, and application forms, which Scott did not mention, and he claimed it was he, and not Scott, who had the authority to actually approve hiring of new employees.

I do not credit any of Pantos' testimony. He portrayed himself as a higher level employee than Scott Edmonson, but Hollander referred Conroy to Scott for hiring, not to Pantos. Pantos claimed he heard the conversation between Scott and the union men, but neither of them said there was anyone else around when they had the conversation. Finally, Hollander testified here and acted as his own attorney throughout. He did not mention in his testimony or argument that Pantos held any position of authority to act for Respondent.

Because the only credible evidence on the question of hiring and the reversal of the hiring of Conroy and Curran comes from those two men themselves. On the basis of that credited testimony, I find that Scott Edmonson did offer Conroy and Curran employment on September 1, 1993, such employment to begin on September 13 for Conroy, and a few days later for Curran. Then, a few hours later, Edmonson withdrew those offers of employment, telling them that the Respondent would not hire union members. These actions are, I find, violative of Section 8(a)(1) of the Act in stating that Respondent would refuse to hire Conroy and Curran; and violations of Section 8(a)(1) and (3) in discharging or withdrawing offers of employment to these two was all on September 1, 1993. The General Counsel has established a prima facie case under *Wright Line*, 252 NLRB 1083 (1980), and the Respondent has presented no credible evidence at all to contradict the facts as established by the General Counsel here.

[7] Curran admitted that he had only worked that way when he was in school and before he began working as a union electrician.

IV. THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act. I shall recommend that it cease and desist therefrom, and that it take the following affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Respondent offer to James R. Conroy and Robert L. Curran immediate reinstatement to the positions for which they were hired on September 1, 1993, or to substantially equivalent positions, leaving, however, to the compliance stage of these proceedings any determination regarding what positions they would have assumed if their hire had not been rescinded, and for a determination of how long such employment would have lasted, *Dean General Contractors*, 285 NLRB 573 (1987). Further, I shall recommend that Respondent pay to Robert L. Curran backpay for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, less net earnings, from September 15, 1993, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

With regard to James R. Conroy, he testified that he is a full-time organizer for the Union and had been such for 3 years as of the date of this hearing. He further testified that while he had worked with the tools of the electricians' trade since becoming a full-time employee of the Union, he had worked at the trade only a total of 4 or 5 weeks in the year before he testified in this hearing. He stated at the hearing that he was willing to go to work for the Respondent at the $12 rate mentioned in his interview with Scott Edmonson on September 1, 1993, but he did not also state that he would give up his full-time position with the Union while working for Respondent.

In that case, I feel it would be a windfall for him if I were to recommend backpay for him in this matter. It would be inequitable, and contrary, in my opinion, to the remedial policies of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Steve Hollander d/b/a Hollander Electric, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Electrical Workers is a labor organization within the meaning of Section 2(5) of the Act.

3. By stating that Respondent would not hire union members as employees, it has violated Section 8(a)(1) of the Act.

4. By discharging or rescinding the hiring of James R. Conroy and Robert L. Curran, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Steve Hollander d/b/a Hollander Electric, Marple Township, Pennsyvania, his heirs, devisees, personal representatives, agents, successors, and assigns, shall

1. Cease and desist from

(a) Stating that Respondent would not hire union members as employees.

(b) Discharging or rescinding the hiring of employees because of their union membership.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to James R. Conroy and Robert L. Curran immediate reinstatement to the positions they would have held in the absence of discrimination against them.

(b) Pay to Robert L. Curran backpay because of loss of earnings suffered by him because of discrimination against him in the manner described in the remedy section of the decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Milltown, New Jersey facility copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''